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## LORD MANSFIELD AND ENGLISH DISSENTERS

CHARLES F. MULLETT\*

Of all the men to whom English religious dissenters owed a debt of gratitude for the improvement in their status during the eighteenth century, none surpassed Lord Mansfield, the Tory Lord Chief Justice. Undoubtedly many less famous judges contributed no small bit to the dissenters' relief by their humane interpretation of the law; mention likewise has often properly been made of those statesmen who, whatever their purpose, by their persistent efforts secured the repeal of penal statutes; and a great deal of respect should be paid to the many private citizens, anonymous or not, who by their votes and their influence showed their disapproval of the burdens under which the dissenters suffered. But, after all credit has been given to these people, the claim of Lord Mansfield to especial attention is scarcely to be challenged. His contributions to this aspect of religious liberty in a measure comprehended that of all these other groups. His judgments rendered nonconformity no crime; he spoke and worked for legislative relief; he openly disapproved of penal burdens. More than this, however, his judicial opinions supplied lesser men with ammunition, and because of their magnificent rhetoric these opinions had hardly less value as tracts for the times than as the authoritative words of the leading judicial oracle of the day. They gave heart to the dissenters and weight to the reformers.

During Mansfield's public career a number of cases arose which gave him the opportunity not only to give legal aid to dissenters, but also to state principles concerning human rights, not the intangible "rights" of nature, but the positive rights of English citizens. What made Mansfield's contribution the more notable was the fact that he did not belong to the political party which so often stressed its interest in liberty, nor was he himself always regarded as the champion of personal rights. During the debates on the power of Parliament over the colonies in America, he was conspicuous

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even in a party which consistently opposed the claims of the colonists to self-government of whatsoever degree. In fact, he was obviously the butt of the remarks made by the great Lord Chatham when that noble gentleman preened himself as one who was no slave to dog-eared law books and who placed persons before precedents. Yet when the struggles for an improved status for Dissenters were being fought, the liberty-loving defender of the colonists in America made no such beneficial contribution as his "reactionary" opponent.<sup>1</sup>

Before tracing Mansfield's contributions to the cause of religious liberty, some attention may be given to his reputation and to his general position in the history of English law. One of his early editors described him as possessing a mind in which the "most exalted talents were improved by the most extensive cultivation" and declared that his distinct and accurate investigations had contributed "not less than the excellent Commentaries of Sir William Blackstone, to display the title of the English law to the rank of a connected and elegant science."<sup>2</sup> Another writer has called him not only the greatest common law judge, but the greatest judge in Anglo-American legal history.<sup>3</sup> Joseph Story, who attempted to duplicate his work in America, praised Mansfield for breaking down the "narrow barrier of the common law" and for redeeming it from "feudal selfishness and barbarity," and described him as the "jurist of the commercial world" whose career was an epoch in English judicial history.<sup>4</sup>

To be sure, not all commentators regarded him so favorably, although they did not deny his ability and influence. Both his personality and his

1. Chatham, however, did speak "very warmly and spiritedly" in favor of a bill for the relief of protestant dissenters in 1772, making the bill a peg on which to hang a defense of toleration. 17 COBBETT, PARLIAMENTARY HISTORY (1813) 440-41.

2. 1 WILLIAM D. EVANS, A GENERAL VIEW OF THE DECISIONS OF LORD MANSFIELD IN CIVIL CAUSES (1803) iv. In 1 BOSWELL'S LIFE OF JOHNSON (1924) 443-44, there is an informing dialogue. After Boswell declared that Mansfield, like Bacon, Selden and Hale, was not a "mere lawyer", Johnson rejoined: "No, Sir. I never was in Lord Mansfield's company; but Lord Mansfield was distinguished at the University. Lord Mansfield, when he first came to town, 'drank champagne with the wits', as Prior says." Johnson would not "allow Scotland to derive any credit from Lord Mansfield; for he was educated in England. 'Much (said he,) may be made of a Scotchman, if he be caught young'." *Ibid.* 469. For the main facts of Mansfield's life, see 3 LORD CAMPBELL, LIVES OF THE LORD CHIEF JUSTICES (1874) 194-493. Mansfield, incidentally, was "sincerely attached" to Episcopalianism. His tolerant attitude had no roots in any experience as a victim of religious persecution. The son of a Jacobite, he might easily have been a religious bigot.

3. H. E. WILLIS, ANGLO-AMERICAN LAW (1926) 153.

4. STORY, MISCELLANEOUS WRITINGS (1835) 261-62.

politics aroused hostility. He impressed many people as overbearing and egotistical, and as one who believed a little too whole-heartedly the essence of what W. S. Gilbert's Lord Chancellor was to sing a century later:

The law is the true embodiment  
Of everything that's excellent:  
It has no kind of fault or flaw;  
And I, my lords, embody the law.

Thomas Jefferson, who saw danger both in the "sly poison" of Mansfield's law and in the "honeyed Mansfieldism" of Blackstone's Commentaries, described Mansfield as "a man of the clearest head and most seducing eloquence."<sup>5</sup> Jeremy Bentham, whose attack on Blackstone was said to have delighted Mansfield, called the latter "a rank and intolerant Tory."<sup>6</sup> And John Quincy Adams in 1829 believed Mansfield to have been more responsible for the American Revolution than any other man.<sup>7</sup>

Nevertheless, while political writers have been mainly impressed with Mansfield's political conservatism and while their ideas have usually prevailed upon historians, there is clearly another side. Although as a politician he opposed every concession to the American colonists and favored policies destined to compel their complete subservience or, as it turned out, their rebellion; as a lawyer he was instrumental in bringing into English law principles that characterize him as a liberal jurist both as to substance and as to procedure. This paradox appears the greater when it is recalled that commercial matters supplied the *casus belli* for the American Revolution and at the same time gave Mansfield an opportunity to achieve rank as the enlightened "jurist of the commercial world."

By his deliberate infusion of English common law with the law merchant, Mansfield no less than Adam Smith paved the way for a "salutary revolution" in the realm of commerce; he enabled English law to keep up with social and economic changes. Through his influence English business men did not have to wait upon parliamentary statutes. Moreover, what Mansfield accomplished in this realm as an architect of the law, he did deliberately. "Precedents," he declared, "only serve to illustrate principles, and to give them a fixed authority. But the law of England, which is exclusive of positive law enacted by statute, depends on principles; and these principles run through

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5. 4 JEFFERSON, WRITINGS (Ford ed.) 479.

6. 10 BENTHAM, WORKS (Bowring ed.) 121.

7. 2 W. W. STORY, LIFE AND LETTERS OF JOSEPH STORY (1851) 12, 20.

all the cases, according as the particular circumstances of each have been found to fall within the one or other of them."<sup>8</sup> And his favorite maxim was, *Boni judicis est ampliare justitiam*.

If his application of this apothegm was a little tainted in the matter of slavery in England,<sup>9</sup> his contributions to the cause of religious liberty appear under no cloud. The "great Ultra-Tory" of Bentham and the American revolutionists gives way to an apostle of toleration no less ardent and eloquent and certainly more influential than the most confirmed radicals of his day. In a series of critical cases he delivered telling blows both at legislation and at judicial precedents which had sought and secured penalties for religious dissent. More than any other one man he relieved dissenters of the stigma of criminality.

Evidence that Mansfield's efforts in behalf of the dissenters did not go unappreciated is to be found in the writings of Dr. Philip Furneaux, a leading nonconformist advocate of greater religious liberty. In 1771, Furneaux addressed a series of Letters to Blackstone concerning that gentleman's exposition of the Toleration Act and the position of nonconformists, in the hope of inducing him to reconsider some passages in the *Commentaries*.<sup>10</sup> In answer to Blackstone's definition of nonconformity as a crime, Furneaux offered ardent denial, saying that the ruling in the case of *Harrison v. Evans* (a case discussed later) conceded that the Toleration Act removed the crime as well as the penalties of nonconformity. As an appendix to the second edition of this tract Furneaux printed the details of the case, extracts from the decisions of the judges, and Mansfield's speech on the case in the Lords. It was from the last that he got most of the ammunition for his attack on Blackstone.

Two years later Furneaux again entered the lists to fight for the "rights" of Protestant Dissenters. His *Essay on Toleration*, a somewhat

8. *Jones v. Randall*, 1 Cowp. 37 (1774).

9. See E. C. P. LASCELLES, *GRANVILLE SHARP AND THE FREEDOM OF THE SLAVES IN ENGLAND* (1928) c. iv. This author, who erroneously believes that Mansfield's mind "was filled with an almost idolatrous reverence for English law," sustains the view that Mansfield had no wish to come to a decision on the position of slaves in England, but was actually forced to do so by the illustrious abolitionist, Granville Sharp. For the case of *Somerset*, which involved this issue, see 20 HOWELL, *STATE TRIALS* (1814) 1.

10. FURNEAUX, *LETTERS TO THE HONORABLE MR. JUSTICE BLACKSTONE, CONCERNING HIS EXPOSITION OF THE ACT OF TOLERATION, AND SOME POSITIONS RELATIVE TO RELIGIOUS LIBERTY, IN HIS CELEBRATED COMMENTARIES ON THE LAWS OF ENGLAND* (2D ED. 1771).

more formal and philosophic piece than his earlier *Letters*, was dedicated to Mansfield and contained some fertile generalizations from the noble lord's speech printed in the earlier tract.<sup>11</sup> The immediate occasion for this tract was the effort of the Protestant dissenters to secure statutory relief, an effort which, needless to say, failed. Failure, however, did not bring cessation of effort, and another prominent dissenter in pleading for toleration substantiated his claim on the ground that Mansfield, along with Camden, had supported the bill.<sup>12</sup> Finally, a few years later, Capel Lofft in his defense of toleration quoted Mansfield on the non-criminality of religious dissent.<sup>13</sup> Such references indicate that the leaders of the nonconformists did not find Mansfield an "ultra-Tory" when religious freedom was involved.

The cases in which Mansfield expressed his sympathy for religious toleration were few in number but they possessed great importance in that his opinions carried the day and once and for all established precedents in favor of the dissenters. Time and again in later years judges referred to Mansfield's decisions as the basis for their own judgments in the same direction.

The first dispute of which we have record that gave Mansfield an opportunity to speak in behalf of religious liberty was one not involving English citizens at all but Mansfield, then Solicitor-general Murray, foreshadowed his later opinions rather clearly. The case of *Omichund v. Barker*,<sup>14</sup> which was decided in 1744, was partly concerned with the right of a "heathen" to be received as a witness. Murray spoke forcefully and convincingly in favor of the right, maintaining in general that if one did business with "heathens," one could not deny them legal rights even though their religious opinions differed from those of the Church of England. Needless to say the evidence was admitted.

11. FURNEAUX, AN ESSAY ON TOLERATION WITH A PARTICULAR VIEW TO THE LATE APPLICATION OF THE PROTESTANT DISSIDENTING MINISTERS TO PARLIAMENT FOR AMENDING, AND RENDERING EFFECTUAL, THE ACT OF THE FIRST OF WILLIAM AND MARY, COMMONLY CALLED THE ACT OF TOLERATION (1773).

12. SAMUEL STENNETT, A FREE AND DISPASSIONATE ACCOUNT OF THE LATE APPLICATION OF THE PROTESTANT DISSIDENTING MINISTERS TO PARLIAMENT. IN A LETTER TO A FRIEND (1772) 30-31. This must have been one of the few times when Mansfield and Camden agreed. See 17 COBBETT, PARLIAMENTARY HISTORY (1813) 790-91.

13. LOFFT, THE RIGHT OF PROTESTANT DISSIDENTERS TO A COMPLEAT TOLERATION ASSERTED (1789).

14. 1 Atk. 21 (1744).

More pertinent to the general theme of this paper because dealing with English citizens exclusively was the case of *Crawford v. Powell* decided in 1760.<sup>15</sup> The facts were simple and the issue occurred frequently. Crawford had been duly elected town-clerk of Harwick in 1758, but Powell refused to turn over "the common seal, books, papers and records of the Corporation," whereupon Crawford secured a mandamus directed to Powell commanding him to deliver the records to Crawford. Powell returned that Crawford had not been duly elected and in the trial it had been twice argued that the plaintiff ought to prove that he had taken the sacrament according to the rites of the Church of England within a year next before his election, in order to qualify for the office under the Corporation Act of 1661.<sup>16</sup> That act stated that no person could be elected into the office of townclerk of a corporation, that had not within one year next before such election taken the Sacrament of the Lord's Supper according to the rites of the Church of England; and in default thereof, every such election was thereby declared void. The plaintiff's failure to prove his having taken the sacrament within the prescribed time was described by Powell's attorneys as a "fatal objection."

Moreover, they reminded the court that under the "Act for Quieting and Establishing Corporations,"<sup>17</sup> no person thereafter to be elected into such office shall "be removed by the corporation or otherwise prosecuted for or by reason of such omission; nor shall any incapacity, disability, forfeiture or penalty, be incurred by reason of the same, unless such person be so removed, or such prosecution be commenced within six months after such person's being placed or elected into his respective office." Since the plaintiff's election had been protested within six months, it appeared "equally fatal" to his case. A return of "non fuit electus" on the grounds of incapacity and disability but not made until after the expiration of six months would have been a false return and the plaintiff had no need to prove his having taken the sacrament within a year, but this return was a true return having been made within the allotted time.

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15. 2 Burr. 1013 (1760).

16. 13 CHAS. II, stat. ii, c. 1.

17. 5 GEO. I. c. 6 (1718). This act also provided that all Corporation office-holders who had failed to take the sacrament were to be "indemnified, freed and discharged" of all penalties arising from such omission; and it likewise repealed the parts of the original Corporation Act (1661) which required the office-holder to take an oath against taking up arms against the king, and to declare against the Presbyterian Solemn League and Covenant.

“But the Court (notwithstanding all this plausible reasoning),” which involved also some very favorable precedents, “over-ruled the objection, and gave judgment for the plaintiff.” Mansfield took the stand that under the statute just mentioned, “the election of a person who had not taken the sacrament within a year next preceding it, is not void, but only voidable in case of a removal or prosecution within the time thereby limited: and consequently, as here was no such removal or prosecution within that limited time, the plaintiff’s election stood confirmed and became absolute.” He believed that the objection had no force and that at least one of the precedents upon which the defendant had depended did not apply in this issue. In delivering this judgment Mansfield very clearly interpreted the law to favor the dissenter. By virtue of the fact that Crawford had not actually been removed, and that although Powell had made return to the mandamus within six months he did not actually prosecute Crawford, Mansfield was able to apply the Georgian statute to the nullification of the Caroline requirement.

Two years later Mansfield gave judgment in a case of somewhat broader import and in words that conveyed his philosophic sympathy with religious toleration. *Rex v. Barker*<sup>18</sup> revolved around a mandamus requiring trustees to admit a dissenting teacher, Christopher Mends, to the use of the pulpit of a presbyterian meeting-house, he having been duly elected according to the terms of the deed by the members of the congregation. The trustees, however, controverted the election of Mends and supported a Mr. Hanmer, whom they put in possession and endeavored to maintain “with a high hand.” The contest had aroused great animosity, and the counsel for the trustees argued against the mandamus to admit Mends on the ground that Hanmer was already in possession, and that such a mandamus went no further than to give a legal possession where otherwise the party would be without remedy, distinguishing in this instance between a mandamus to admit and a mandamus to restore. Since Mends had never been in possession and his title was not legal but only equitable it was further argued that this Court had no jurisdiction.

Mansfield, however, declared a mandamus to be a prerogative writ to apply where a person is kept out of possession or is dispossessed of his right to execute an office and “to be used upon all occasions where the law has established no specific remedy, and where in justice and good government

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18. 3 Burr. 1265 (1762).



there ought to be one." Pointing out that this writ had been "liberally interposed" within the last century "for the benefit of the subject and the advancement of justice," he went on to maintain that since the Toleration Act, "it ought to be extended to protect an endowed pastor of Protestant Dissenters; from analogy and the reason of the thing." Mr. Justice Wilmot sustained Mansfield's concept of a mandamus and Mr. Justice Foster, scarcely less ready than Mansfield to give aid to dissenters, supported Mansfield by affirming, "Here is a legal right. Their ministers are tolerated and allowed: their right is established, therefore is a legal right, and as much as any other legal right."

Mansfield then ordered the trustees to show cause why a writ of mandamus should not issue, directed to them, requiring them to admit Christopher Mendis to the use of the pulpit in a certain meeting-house appointed for the religious worship of Protestant Dissenters commonly called Presbyterians, and to acquaint the Court as to whether they insisted on the validity of Hanmer's election and whether they were willing to have a new election. It was further asked that Hanmer be given notice of the order so that he might be heard and so that he might acquaint the Court whether he insisted on the validity of his election and whether he was willing to have it tried in a "feigned issue." As might be expected the trustees' counsel opposed the mandamus and insisted upon the validity of Hanmer's election, their unwillingness to have a new election, Hanmer's conviction of the validity of his election, and his unwillingness to have it tried in a "feigned issue."

Nevertheless the Court, having considered the matter fully, favored the granting of a mandamus, neglecting, for reasons which do not appear in the case, the fact that the election of Mendis was liable to objections on the ground of nonqualification under the Toleration Act. "To deny this writ," said Mansfield, "would be putting Protestant Dissenters and their religious worship, out of the protection of the law. This case is intitled to that protection; and can not have it in any other mode, than by granting this writ."

Notwithstanding these rather obvious efforts to extend the protection of the Courts to Protestant Dissenters, Mansfield did not always give judgment on that side, as the unimportant case of *Rex v. Wroughton, Esq. and Others*, decided in 1765, reveals.<sup>19</sup> Here a rector of the Church of England, Townshend by name, being a "well-wisher to the Methodists," had admitted one of the sect to his pulpit. Wroughton, a local justice of the peace, "strenu-

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19. 3 Burr. 1683 (1765).

ously opposed" this admission, and afterwards Townshend attempted to secure an information against him for a misdemeanor in obstructing divine service and grossly insulting the rector. Mansfield declared against the Court's interposing in the matter on the grounds that Townshend had "suppressed truth" and had misrepresented the case, that the Methodist had no license from the bishop of the diocese as was required, and that the bishop had actually instructed Wroughton to see that "the general and usual course of celebrating divine service in the Established Church" was complied with and that no unlicensed preacher should preach in this particular church. Mansfield did take occasion to state, however, that he would have it understood, in general, that Methodists had a right to "the protection of this Court, if interrupted in their decent and quiet devotion: and so had "dissenters from the Established Church likewise, if so disturbed." But since Mr. Townshend was not in this position and had defied and disobeyed the bishop who had the right to license all who preached in his diocese, he had no claim to protection from the Court.

Another rather unimportant case involving Methodists but at the same time having reference to religious dissent came up in 1766 under the title, *Rex v. Justices and Clerk of the Peace for the County of Derby*.<sup>20</sup> The defendants attempted to show cause why a mandamus should not issue to oblige them to certify and register a dissenting meeting-house. Their counsel stated that the parties certifying had not shown what species of Protestant dissenters they were "so as to entitle themselves to the indulgence shewn by the Toleration Act; which only meant to give ease to tender consciences, when professing such principles, as neither endanger the civil government, nor undermine the fundamental doctrines of the Christian religion." The counsel further declared that the dissenters had not specified in what points they dissented and indeed might be Socinians. Supposing them only Methodists, "which was the fact," there was the serious question as to whether they came within the Toleration Act since they did not dissent from the Church of England. It was further objected that the house was not proper to be registered since the parties applying were not of the neighborhood and by *Regina v. Peach*,<sup>21</sup> early in the reign of Anne it was held that a dissenting

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20. 4 Burr. 1991; 1 Bla. W. 606 (1766).

21. 2 Salk. 572 (1705). In 6 Mod. 228, it is given at greater length under the title of *Peat's Case*. By the statute of 10 ANNE, c. 3, §9, however, if a dissenting minister were qualified according to the Toleration Act he might officiate in any congregation, provided the meeting-house had been properly registered and a certificate of his qualifications had been left with the clerk of the peace of the county where he qualified.

minister who had qualified in one county could not officiate in another. Since also a meeting-house when registered acquired some privileges and it became a felony to demolish it, persons living out of the neighborhood might not certify it and thereby give it those privileges. Finally, the persons certifying the meeting-house had not brought themselves within the terms of the Toleration Act by taking the oaths and making the declaration. In spite of these weighty reasons Lord Mansfield held that "no inconvenience can attend the registering of this meeting-house" and that in performing that rite the action of the justices was "merely ministerial." He likewise declared that the registry and certificate did not prove the persons applying for registration to be within the act. They would still have to show that they had satisfied the required qualifications if called upon. If they were within the Toleration Act, the mere registering of their meeting-house would not protect them from the penalties of the law. Regardless of these qualifying warnings, however, Mansfield did grant the mandamus and thus again displayed his willingness to aid dissenters.

The following year a long dispute drew to a close and Mansfield provided the clinching arguments in phrases that heartened many a dissenting advocate of greater religious and political liberty. The case of *Harrison v. Evans*<sup>22</sup> had its origin in a London by-law which imposed a heavy fine on those who refused the office of sheriff. Although by the terms of the Corporation Act no dissenter could serve the office, many were nominated and elected and paid the fines for not serving. When some refused to pay the fines the corporation brought action in the Sheriff's Court to recover the fines. In 1757, in the case of Allen Evans, that Court gave judgment to the plaintiff. Evans then carried an appeal to the Court of Hustings which affirmed the earlier judgment. On a writ of error Evans appealed to the Court of Judges Advocates which in 1762 unanimously reversed the earlier judgments. This time, the corporation by writ of error brought the case before the House of Lords where judgment again was given to Evans. On this occasion Mansfield delivered a magnificent speech in behalf of the dissenters which once and for all denied their criminality.<sup>23</sup>

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22. Wilm. 130 (1762); 2 BURNS, ECCLESIASTICAL LAW (8th ed.) 207; FURNEAUX, LETTERS (1771) 257-83; 16 COBBETT, PARLIAMENTARY HISTORY (1813) 313-27. See also the present writer's article, *The Corporation Act and the Election of English Protestant Dissenters to Corporation Offices* (1935) 21 VA. L. REV. 641-64, for a sketch of this problem.

23. 16 COBBETT, PARLIAMENTARY HISTORY (1813) 313-27.

He began by explaining that he had moved for the opinion of the judges in the Lords in order that the House might have the benefit of expert assistance and also in order that in future cases of like nature, the House would know how to decide. Thereupon he moved with his most characteristically "seducing eloquence" into a lengthy disquisition upon the principles as well as upon the law involved, premising that the action of the corporation in inflicting a penalty on those who declined the office of sheriff could not be supported. If, he said, the city relies on the Corporation Act which forbade the election of a person who had not satisfied the sacramental test, then the defendant (Evans) was not elected and the case against him failed. If, moreover, the city grounded its action on the design of the legislature, in passing the Corporation Act, of keeping dissenters out of office, then Evans being a dissenter, and, in the eye of the law, a dangerous, ill-affected person, was excluded from office and disabled from serving. If, again, the city based its action on its own by-law, of which the express purpose was to secure fit and able persons to serve the office, then Evans not being fit and able under the terms of the Corporation Act was not punishable for his refusal. Finally, if the city grounded its case on the defendant's neglect of taking the sacrament, it should be remembered that the Toleration Act had freed dissenters from that obligation and therefore the defendant had not been guilty of criminal neglect.

Thereupon Mansfield turned to consider the Corporation Act itself and the intent of the legislators in passing it, which was simply to keep disaffected persons out of power. Therefore, they had put it out of the power of the electors to choose such persons as well as out of those persons' power to serve. Before the Toleration Act, however, no person could plead the sacramental disability resulting from the Corporation Act in bar of such action as now existed, because such a disability was then a crime. No longer was it a crime to be a dissenter; in fact it would be a crime for a dissenter not to obey the dictates of his own conscience. Since neither statute law nor common law made nonconformity a crime, punishment ought not to be inflicted for mere difference of opinion with respect to modes of worship.

One judge, Baron Perrott, who concluded that Evans was not at liberty and ought not to be allowed to object to the validity of his election on account of not having taken the sacrament according to the rites of the Church of England, had argued that the Toleration Act only amounted to an exemption of Protestant Dissenters from the penalties of certain laws

which it mentioned and did not include the Corporation Act. To this Mansfield replied that the Toleration Act ought not to be interpreted so narrowly and then he proceeded to relate the Toleration Act to the general legal position of the Protestant Dissenters. That act, he said, "renders that which was illegal before, now legal; the Dissenters' way of worship is permitted and allowed by this Act; it is not only exempted from punishment, but rendered innocent and lawful; it is established: it is put under the protection, and is not merely under the connivance, of the law. In case those who are appointed by law to register Dissenting places of worship, refuse on any pretence to do it, we must, upon application, send a Mandamus to compel them . . . . Dissenters, within the description of the Toleration Act, are restored to a legal consideration and capacity; and an hundred consequences will from thence follow, which are not mentioned in the Act. For instance, previous to the Toleration-act, it was unlawful to devise any legacy for the support of Dissenting Congregations, or for the benefit of Dissenting Ministers; for the Law knew no such assemblies, and no such persons; and such devise was absolutely void, being left to what the Law called superstitious purposes. But will it be said in any Court in England, that such a devise is not a good and valid one now? And yet there is nothing said of this in the Toleration-act. By that Act the Dissenters are freed, not only from the pains and penalties of the Laws therein particularly specified, but from all ecclesiastical censures, and from all penalty and punishment whatsoever on account of their Nonconformity, which is allowed and protected by this act, and is therefore in the eye of the law no longer a crime."

Turning to apply these principles to the case under dispute—and it may be said that few men interpreted the Toleration Act so generously—Mansfield insisted that Evans might plead his sacramental disability in bar of the action without being considered a criminal. The maxim that a man shall not be allowed to disable himself was held not to apply in this case, though Perrott had used it, for no man could be denied the right to plead that he was not fit and able. He might legally plead that he lacked the £15,000 necessary to qualify for the office of Sheriff, and, within the Toleration Act, he might plead that he had not fulfilled the sacramental test, this being a reasonable and a lawful excuse. It was not excusing one crime by another. Furthermore, the right which the King had to the service of all his subjects must be properly qualified. Natural or civil disabilities might excuse a man, and in this case Evans was barred by a civil disability. He has shown that he is a *bona fide* Dissenter within the description and the requirements of the

Toleration Act and his plea that he is disabled from holding office is a sound and legal plea.

From this Mansfield turned to a discussion of religious liberty. "Conscience," he said, "is not controulable by human laws, nor amenable to human tribunals. Persecution, or attempts to force conscience, will never produce conviction; and are only calculated to make hypocrites, or—martyrs." The common law knew no prosecution for mere opinions, for bare Nonconformity was no sin by common law and all positive penal laws had been repealed by the Toleration Act. There was nothing "more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian Religion, more iniquitous and unjust, more impolitic, than Persecution" which was "against Natural Religion, Revealed Religion, and sound Policy." These principles he further illustrated from the history of France, but he admitted that when the Jesuits prepared to persecute the Huguenots they did not hit upon such an "exquisite dilemma" as that in which the English Protestant Dissenters were placed. The Jesuits merely repealed the Edict of Nantes. Englishmen had passed a law to render Dissenters incapable of office and then had passed another to punish them for not serving. This was as bad persecution as that of Procrustes: "If they are too short, stretch them, if they are too long, lop them."

The by-law came in for especial denunciation as having been made in the face of the Corporation Act and the Toleration Act which were acts of Parliament. The election of Evans was contrary to the express purpose of this by-law in seeking to obtain "fit and able" persons, for he was incapable of serving. He like many of his fellow religionists was chosen not for his services but for his fine. In opposition to that penalty, he has pleaded a legal disability grounded on two acts of Parliament. "I am of the opinion that his plea is good." The opinion was affirmed by the Lords, and the judgments against Evans were reversed.

The significance of this case can hardly be over-estimated for it ended a practice which had been in vogue for a century. Thereafter, no Protestant Dissenter could be punished twice for the same offense as had been the situation. If for no other reason, the Dissenters owed Mansfield a great debt of gratitude. More than throwing his influence in favor of Evans, however, he took the opportunity to define the legal position of the Dissenters and to speak out boldly against persecution. But this case did not end his activity

and a few years later he was to remove another burden under which a certain sect of nonconformists suffered because of their nonconformity.

In the case of *Atcheson v. Everitt*,<sup>24</sup> which arose 14 years later, Mansfield was dealing with the matter of Quaker evidence. In an action of debt, in which the plaintiff won the verdict, it had been moved on behalf of the defendant that there might be a new trial because a Quaker had been received as a witness on his affirmation; and it was objected, that this being a criminal cause, his evidence ought not to have been received. Lord Mansfield declared the question to be of very great importance, "both as to all the Quakers in the Kingdom, and to the general administration of justice." He wished that by the statute, 7 & 8 William III, c. 34, "the affirmation of a Quaker had been put on the same footing as an oath, in all cases whatsoever." Formerly, he said, the legislature had looked upon Quakers as particularly obstinate and criminal offenders but "the more generous and liberal notions of the present times" did not regard real scruples as an offense. Even before the passage of the statute, Quakers "were safe where the Attorney-General could controul; but they wanted to be secure from the persecution of private individuals." However, Quakers had not been admitted as witnesses in criminal causes. "The question therefore is, what the statute means by the words 'criminal causes'." Diligent search has revealed that the Courts in late years have relaxed their former severity; a wide variety of suits had been considered as civil.

The action in this case, however, was not only given "to recover a penalty" but it was also attended with disabilities, and therefore partook of the nature of a criminal cause. Moreover, the offense was both *malum prohibitum*, by statute, and indictable at common law. "Upon general principles, I think the affirmation of a Quaker ought to be admitted in all cases . . . But how the law is in respect to this particular case I am at present not at all decided in my opinion."

After Mr. Justice Aston had spoken in the same vein, the attorney for the defendant set about proving that the present cause was criminal and that therefore by statute and by precedent the Quaker's testimony was not admissible. "And it matters not," he maintained, "whether the offense is of the greatest or least magnitude: if the end of the action is merely damages, a Quaker's affirmation is admissible: but wherever the end is

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24. 1 Cowp. 382 (1776).

punishment, as in this case, it is not." In rebuttal an attorney for the plaintiff declared the cause to be civil on the basis of the form of proceeding. The plaintiff in choosing to prosecute by action rather than by indictment had proceeded civilly not criminally; the plea was *nil debet*, not that the defendant was not guilty. He stated also that there were no authorities for arguing that the testimony ought not to be received in a case like the one in question.

Lord Mansfield in summing up and giving judgment took full advantage of the opportunity to reiterate his sympathy with toleration. "I think it of the utmost importance," he said "that all the consequences of the Act of Toleration should be pursued with the greatest liberality, in case of the scrupulous consciences of Dissenters on the one hand; but so as those scruples of conscience should not be prejudicial to the rest of the King's subjects." He declared that the cases where the affirmation of Quakers had been denied were founded upon the hasty decision in *Hilton v. Byron*,<sup>25</sup> and little or no attention had been paid to the parliamentary statute itself. Then, having discoursed upon the Quakers' unfortunate position during the Restoration when their scruples were proved to be real, he reminded the Court that a more liberal way of thinking had prevailed since the Revolution. "The principles of toleration were explained and justified in consequence of the writing of Mr. Locke, Lord Somers, and other great men of those times," and the Toleration Act giving extensive relief to scrupulous consciences was passed. Although this act and the later one touching affirmation had paid especial attention to the Quakers, this sect had not been admitted to full privileges. His own opinion—and other judges agreed with him—was "that upon the principles of the common law, there is no particular form essential to an oath to be taken by a witness: but as the purpose of it is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his conscience most." In substance an oath and an affirmation were the same thing.

The act permitting affirmation in place of oath had been fought hard and carried only by small majorities. It was highly probable that the exception

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25. 3 Salk. 248 (1700). Mansfield here erred in stating this case to be cited in *Rex v. Bell, Andr.* 200 (1738). In this latter case, the court held a Quaker's affirmation not receivable in a criminal cause, although efforts were made to show that this particular cause had started as a civil cause.



as to criminal causes came in by way of amendment. Although in some ways the position of the Quakers had been much improved, in other ways they had suffered, for before the statute, "if a Quaker were indicted for a capital offence, he might call Quakers as witnesses in his defence, and that without oath . . . But now by stat. 1 Ann. st. 2, c. 9, sect. 3, all persons examined in criminal cases must be examined on oath, both for and against the Crown; therefore, if a Quaker be indicted, he cannot have the benefit of Quaker testimony." This, however, he said was "an exception not to be extended by equity."

Herewith Mansfield turned to the case in question: "Is the present a criminal cause?" There was, he said, a well known distinction between criminal prosecutions and civil actions, and "penal actions were never yet put under the head of criminal law, or crimes." The intent of the legislature was to except Quaker evidence in "causes technically criminal." A different construction "would not only be injurious to Quakers, but prejudicial to the rest of the King's subjects who may want their testimony." Furthermore, Quakers as dissenters from the Church of England were guilty of no crime, and they had been held good witnesses. Their excuse for refusing to take oaths was a good excuse. "No authority whatever had been mentioned on the other side, nor any case cited where it has been held that a penal action is a criminal case." In conclusion, he admitted not the "least embarrassment" in stating that upon a penal action a Quaker's evidence might be received upon his affirmation. Therefore, he was of the opinion that "Mr. Justice Nares did perfectly right in admitting this Quaker to be a witness upon his affirmation; and consequently that the rule for a new trial should be discharged." With this ruling the three other judges concurred.

Thereafter Mansfield seems not to have been involved in disputes affecting religion; indeed during his last years as Lord Chief Justice no cases of this sort seem to have arisen. His influence, however, did not lapse. Although the decisions in subsequent cases did not always favor the dissenters, the penalties for religious nonconformity were sharply limited and the issues upon which Mansfield had passed judgment were not reversed. Not infrequently his judgments in favor of the dissenters were quoted in their defense in later years. More than any other one man, he was responsible for the principle that religious nonconformity of itself was not a crime, and he stated that principle when not only the bulk, but also the weight of legal opinion favored the opposite doctrine. Parliamentary enactment in later

years merely confirmed what the Courts under Mansfield's guidance had long since decided.

The career of Lord Mansfield, then, as touched upon here, reveals the utter inadequacy of such comprehensive catchwords as "liberal" and "conservative." Every man who is born into this world alive is *not*, the author of *Iolanthe* to the contrary, "a little liberal or little conservative." He is rather a complicated mixture of both, in the same day. At the very time that Mansfield was drawing upon himself the denunciations of American colonists he was handing down decisions designed to relieve religious dissenters. In fact, while a statute that was at least partly his child was being denounced in the thirteen colonies for establishing what Samuel Adams called the "religion of the Pope" in Canada, this same statute, the Quebec Act, was paving the way by its religious enlightenment for the loyalty of Canada to Great Britain. In view of this activity as well as in connection with his reception of the law merchant, it is time that the political "reactionary" gave way in part to the judicial and the religious "liberal." To have been denounced in the halls of colonial legislatures for his political conservatism and to have been attacked personally by a London mob which burnt his house during the London riots because of his support of religious toleration, and to have been denounced by Junius<sup>26</sup> because the Roman code, the law of nations, and the opinion of foreign civilians were his "perpetual theme" while he was never heard to mention Magna Carta or the Bill of Rights "with approbation or respect," reveals clearly the truth of "Bozzy's" statement that Mansfield was not a "mere lawyer." Since he was not, it is time for others than lawyers to appreciate his stature.<sup>27</sup>

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26. 1 LETTERS OF JUNIUS (1890) 308; letter of November 14, 1770. For Mansfield's position during the Gordon Riots, see J. P. DE CASTRO, *THE GORDON RIOTS* (1926).

27. For some very suggestive comments, see J. S. Waterman, *Mansfield and Blackstone's Commentaries* (1934) 1 CHI. L. REV. 549.